1-RPF-08/01/07-skh

No. 33352

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFREY A. HORKULIC, REBECCA A. HORKULIC, his wife, and JEFFREY HORKULIC, As Natural Parent and Legal Guardian of Stephanie Horkulic and Benjamin Horkulic, minors,

Plaintiffs Below, Appellees,

vs.

WILLIAM E. GALLOWAY, GALLOWAY LAW OFFICES, CAMBRIDGE PROFESSIONAL LIABILITY SERVICES

Defendants Below, Appellees,

and

TIG INSURANCE COMPANY,

Defendant Below, Appellant.

BRIEF ON BEHALF OF APPELLEES

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Treatises

1-RPF-08/01/07-skh

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To: The Honorable Justices of the Supreme Court of Appeals of the State of West Virginia:

I.
The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

Appellees, Jeffrey A. Horkulic and Rebecca A. Horkulic and their two children (hereinafter "Horkulics") filed a legal malpractice action against Attorney William E. Galloway (hereinafter "Galloway") for failing to file a personal injury claim within the statute of limitations. Galloway's malpractice insurance carrier, TIG Insurance Company (hereinafter "TIG" and/or appellant) and its administrator Cambridge Professional Liability Services (hereinafter "Cambridge"), were joined as defendants for violations of the Unfair Claims Settlement Practices Act. W.Va. Code §33-11-4(9)(West 2007.) Pursuant to a motion by TIG and Cambridge, the Court stayed all proceedings against them until resolution of the underlying legal malpractice claim. The case proceeded solely against Galloway for the torts of legal malpractice, fraud and outrage.

The Horkulics and Galloway by and through their attorneys entered into a settlement agreement on May 6, 2005. The settlement agreement included several material items. The settlement provision which serves as the sole basis for TIG's objection and this appeal was Galloway's agreement to enter a confessed judgment on liability and damages totally $1.5

million. When the settlement was not consummated Horkulics filed their Motion to Compel Enforcement of Compromise Settlement Agreement on August 10, 2005. A supplement to the Motion was filed by Horkulics on November 4, 2005, and the hearing was held on May 30, 2006. At the hearing, Attorney William Wilmoth, who had represented Galloway throughout the settlement negotiations, testified and admitted that there was a settlement agreement which included the requirement that Galloway would confess liability and damages totaling $1.5 million. Attorney Wilmoth was the only witness called by the parties and multiple exhibits corroborated his testimony.

The Circuit Court of Hancock County, West Virginia, entered its Findings of Fact and Conclusions of Law and Order on August 25, 2006, and found that the settlement agreement as alleged by appellees Horkulics had been agreed to between Horkulics and Galloway on May 6, 2005, and at the latest on August 18, 2005. (Finding of Fact 29, Conclusions of Law 9.)

It should be noted that Horkulics' motion to compel enforcement of the settlement agreement only requested enforcement of the agreement between the Horkulics and Galloway. It was and is appellees Horkulics' position that the settlement agreement was between Horkulics and Galloway only, which is the specific relief requested in Horkulics' Motion.

See Horkulics' Motion to Compel Enforcement of Compromise Settlement Agreement. In addition, Horkulics' counsel only requested enforcement of the agreement at the hearing of May 30, 2006, between the Horkulics and defendant Galloway. Transcript from hearing held on May 30, 2006 (hereinafter "T."), p. 14:4.

Horkulics' counsel further advised the Circuit Court at the end of the May 30, 2006, hearing that he had envisioned the issue created by the Motion to Compel as between Horkulic and Galloway, T. 118:19, 119:21, and further noted that there may be another phase to these proceedings where the attorneys would actually become witnesses. T. 121:5.

Appellees Horkulics are requesting that this Court affirm the Circuit Court's findings of fact, conclusions of law and order as entered on August 25, 2006, as it relates to the settlement agreement between Horkulics and defendant Galloway. TIG's appeal does not request that the settlement agreement between Horkulics and Galloway be overturned. Quite to the contrary, TIG admitted in its brief that such a finding was proper:

> "The Circuit Court easily could have entered an order regarding only Mr. Galloway and Appellee's [Horkulics] agreement to enter into the proposed settlement. **THERE WOULD BE NO DISPUTE IF THE ORDER STATED THAT MR. GALLOWAY AND THE APPELLEES [HORKULICS] ENTERED INTO A SETTLEMENT.**" [Emphasis added.] See appellant's brief, p. 23.

Furthermore, appellants "requested relief" does not in any way request that the settlement agreement between the Horkulics and Galloway be changed or modified. TIG's requested relief principally affects Galloway who is the true Appellee in this appeal case. Nonetheless, Horkulics will respond to the arguments of TIG because they are without merit.

II.

Statement of Facts

On November 19, 1999, Jeffrey A. Horkulic and Rebecca A. Horkulic received significant personal injuries resulting from an automobile collision in the State of Ohio. The Horkulics medical bills were in excess of $32,000.00 and Mr. Horkulic missed over 125 days of employment. The Horkulics who were West Virginia residents employed Attorney William E. Galloway, who had offices in Weirton, West Virginia, to represent them in their personal injury claim.

Attorney Galloway failed to settle or file Horkulics' claims within the applicable statute of limitations. Galloway, who was a solo practitioner, informed the Horkulics that the deadline for filing a complaint had been missed; however, he did not accept responsibility for this clear act of malpractice and indicated to the Horkulics that he was investigating to determine "the person responsible for the missed deadline." See Galloway letter dated December 13, 2001, attached hereto as

Exhibit 18. Appellee Galloway obtained authority from the defendants TIG and/or Cambridge to negotiate a settlement with the Horkulics for his own malpractice claim. Galloway obtained permission from the Horkulics to negotiate a settlement but failed to advise the Horkulics that he would be negotiating a settlement with his own malpractice carrier for his own malpractice. See Exhibit 18.

When Galloway was unable to negotiate a settlement with Horkulics for his malpractice claim, Horkulics employed new counsel and another attempt at settlement was unsuccessful. Galloway then filed a declaratory judgment action in the State of Ohio against his former clients, the Horkulics, requesting a finding that Ohio law would apply to the malpractice claim and that it should be tried in an Ohio Court. Galloway later testified that his attempt to obtain Ohio jurisdiction was because it was his opinion that verdicts were lower in the State of Ohio than in West Virginia. The Horkulics were forced to employ counsel to represent them in the Ohio proceeding, which was ultimately dismissed. Attorney Galloway appealed the decision to an appellate court in Ohio who also ruled against him.

The Horkulics ultimately filed a legal malpractice claim against Defendant Galloway and also joined Galloway's

malpractice carrier, TIG, and its administrator, Cambridge, for violating the Unfair Claims Settlement Practices Act. Upon motion by TIG and Cambridge all claims and discovery were stayed against them by Order of the Circuit Court of Hancock County, West Virginia, entered September 5, 2003.

Appellant TIG dismissed the first two attorneys that represented Galloway in these proceedings and then employed Attorney William D. Wilmoth, as Galloway's third attorney of record. Attorney Wilmoth is a partner in the law firm of Steptoe & Johnson, in Wheeling, West Virginia, has been a member of the State Bar of West Virginia for over thirty-one years, was a former United States Attorney and is one of the most reputable attorneys in the State. T. 23:17. TIG employed and paid Mr. Wilmoth to represent Defendant Galloway in these proceedings. T. 24:17. Defendant Galloway signed a written consent to settle. See Exhibit 19 attached hereto.

Pursuant to a request from Attorney Wilmoth a meeting was held between him and Horkulics' attorney, Robert P. Fitzsimmons. During the meeting, two alternative settlement proposals were discussed. Alternative B, which is not relevant to this proceeding, provided for a cash payment in exchange for a release of the malpractice claim. The other alternative included six material subparts, which were:

(1) Policy limits, which were believed to be $500,000[1] minus the cost of litigation and expenses of approximately $50,000 for a cash payment of $450,000;

(2) Defendant Galloway would confess judgment on the issue of negligence and judgment for damages in the total sum of $1.5 million;

(3) TIG would consent to the judgment order and the confessed judgments;

(4) Horkulics would agree not to execute against Galloway on the judgment;

(5) A dismissal with prejudice would be entered in favor of Defendant Galloway; and

(6) If Defendant Galloway filed any claim against TIG or Cambridge, Horkulics would receive a percentage. See August 25, 2006, Order, finding of fact 10.

TIG's senior corporate claims analyst, Mark S. Rapponotti, sent a letter to Attorney Wilmoth dated May 6, 2005, giving him

[1] The attorneys had believed that the policy limits of $500,000 would be reduced by fees and expenses which they estimated to be approximately $50,000, thereby providing for a cash payment of $450,000. Upon review of the policy, it was later determined that this was not correct and the policy limits were, in fact, $500,000, thereby explaining the difference between the original $450,000 cash offer and the ultimate $500,000 cash payment found as part of the settlement.

authority to settle the malpractice claim for $500,000 but indicated that TIG would not agree to Item 3 of the settlement proposal, i.e. TIG would consent to the judgment order and the confessed judgment. See Exhibit 1, May 30, 2006, transcript. According to the testimony of Attorney Wilmoth, who was the only witness called at the May 30, 2006, hearing, he met with Horkulics' counsel and conferenced in by phone TIG's claims representative Mark S. Rapponotti, who is also an attorney, and they agreed that TIG would not have to consent to the confessed judgment but Galloway would nonetheless file it and TIG could place its objections on the record. Attorney Wilmoth testified "at that point there was a settlement which protected Bill Galloway's personal assets and settled the malpractice claim." T. 31:13. Attorney Wilmoth also testified that TIG had agreed to allow Galloway to enter the confessed judgments. It was not until later that TIG "began making noises over the confessed judgments. T. 32:18.

Following the May 6, 2006, meeting, it was clear that Horkulics' and Galloway's representatives and attorneys had a meeting of the minds as was evidenced by Attorney Wilmoth's testimony indicating:

> "It was my opinion that at that time [May 6, 2006] the case was settled. T. 33:15...Yes, sir, I thought the case was settled." T. 35:13.

Without doubt, Attorney Wilmoth believed there was a settlement agreement which included a confessed judgment to be filed by Defendant Galloway. See T. 35:16.

According to the testimony of Attorney Wilmoth, Mr. Rapponotti never expressed any reservations about policy language or reservations of rights in discussing the settlement in May of 2005. T. 36:11. On May 24, 2005, Attorney Wilmoth e-mailed TIG's senior claims analyst, Attorney Rapponotti, and advised him that they had provisionally settled the Horkulics' case, and included within that e-mail the following statement:

> "Plaintiffs wanted TIG to agree to the entry of the consent judgment, which TIG was not inclined to do. Therefore, Plaintiffs will file a 'Motion for Entry of Consent Judgment,' **TO WHICH MR. GALLOWAY WILL AGREE (TO PROTECT HIS ASSETS)**" [Emphasis added.] Exhibit 2, May 30, 2006, transcript.

Attorney Rapponotti acknowledged the e-mail from Wilmoth and thanked him for responding to his inquiries. Exhibit 2 - May 30, 2006, transcript. Attorney Wilmoth testified at the May 30, 2006, hearing that Galloway's consent judgment on liability and damages was, in fact, part of the agreement. T. 38:21, 39. Relying upon this agreement, plaintiffs' counsel wrote several letters inquiring as to when the proceeds and release would be sent. See Exhibit No. 3, May 30, 2006 transcript. Significantly, Attorney Wilmoth testified that he

had no question in his mind that a settlement agreement had been reached in May of 2005. T. 40:12.

Following the May, 2005, settlement agreement the record reflects that TIG became stricken with post-settlement remorse and attempted to sabotage the settlement agreement by issuing a reservation of rights letter and going after Mr. Galloway personally if need be. T. 42:3. According to Galloway's attorney, TIG's undermining efforts were taken after the parties had entered into a settlement agreement. T. 42:8. Once again, it should be emphasized that the only feature of the settlement which was being objected to by TIG was Galloway's confession of judgment on liability and damages.

Although under the terms of the agreed-upon settlement TIG did not have to consent and could actually object to the confessed judgment, TIG nonetheless became troubled by the confession provision. Presumably this was because TIG recognized that the confessed judgment would serve to eliminate proof of the actual damages incurred by the Horkulics in the Unfair Claims Settlement Practices Act claim. The motive for TIG's conduct is obvious. TIG, who received valuable premium dollars from Attorney Galloway in order to protect his interests, was now attempting to sabotage the entire settlement in order to benefit itself in the upcoming Unfair Claims

Settlement Practices Act case and was willing to throw its insured Galloway to the wolves in order to protect their own hide.

Attorney Wilmoth testified that he had a conversation with his client Galloway on May 20, 2005 and in that conversation Galloway told him to "push the settlement forward as self protection because it protected his assets from being gotten at by anyone" and after conferring with his personal attorney he "consented to the settlement" which included the confessed judgment. T. 56, 57.

On August 10, 2005, Horkulics filed their "Motion to Compel Enforcement of Compromise Settlement Agreement" because no monies had been paid and the release had not been tendered for review.

On August 18, 2005, Attorney Wilmoth received a call from a threesome of attorneys representing TIG, namely, Flaherty, Zerman and Ruberry, the later two of which are Chicago attorneys and they discussed the Motion to Compel and previous settlement discussions. This foursome of TIG attorneys then conferenced in Horkulics' counsel, Robert P. Fitzsimmons, and corrected the cash offer from the $450,000.00 figure to the $500,000 figure because they had determined that expenses would not be a deduction from the limits. T. 59:22.

Attorney Wilmoth testified that all of the participants in the August 18, 2005, phone conversation, specifically including the three TIG representatives and himself, together with Horkulics' counsel, again agreed to the settlement, which specifically included that Galloway would file the confessed judgments on liability and damages of $1.5 million and TIG would file an objection. T. 61:11, 18; See also Exhibit 17, May 30, 2006, transcript.

The material parts of the August 18, 2005, reaffirmation of settlement were memorialized in a September 1, 2005, letter from Attorney Fitzsimmons to Attorneys Flaherty and Wilmoth, and expressly provided in Item 2 that Attorney Galloway would confess judgment on liability and damages of $1.5 million and that TIG would file objections to the confessions of judgment. See Exhibit 5 and the handwritten notes of Attorney Wilmoth - Exhibit 17, May 30, 2006, transcipt. This letter of September 1, 2005, unquestionably evidences Horkulics counsel's confirmation of a settlement which stated in the initial paragraph:

> **"IT IS MY UNDERSTANDING THAT WE DO HAVE A SETTLEMENT AGREEMENT, WHICH IS AS FOLLOWS:..."** [Emphasis added.]

In reliance on the agreement, Horkulics' counsel sent three letters of inquiry dated September 16, 19, and 29, 2005. Exhibits 6, 7 and 8; May 30, 2006, transcript. On September 29, 2005, Attorney Wilmoth left no doubt that a settlement had been reached and confirmed:

> **"ACCORDING TO MY NOTES AND RECOLLECTION OF THE CONFERENCE CALL WE ALL HAD WITH MR. RUBERRY AND MRS. ZERMAN ON AUGUST 18, I BELIEVE YOUR SEPTEMBER 1 LETTER (FITZSIMMONS CONFIRMATION OF SETTLEMENT) ACCURATELY REFLECTS THE CONVERSATIONS WE HAD, AND THE 'RE-STATEMENT' OF THE SETTLEMENT ALREADY REACHED."** [Emphasis added.] Exhibit 9, May 30, 2006, transcript.

Consistent with and clearly evident of the settlement, Attorney Wilmoth wrote to plaintiffs' counsel by letter of October 28, 2005, asking him how [Horkulics] wanted the settlement drafts payable. This letter also made inquiry as to whether plaintiffs still wanted to structure part of the settlement monies. Exhibit 10, May 30, 2006, transcript. Again, plaintiffs' counsel wrote several letters requesting the release and/or aspects of the settlement. Exhibits 12 and 13, May 30, 2006, hearing. On November 8, 2005, Attorney Wilmoth wrote a letter to Horkulics' counsel indicating, "I will do a first draft of the Release as soon as I receive the structured settlement language." Exhibit 14; May 30, 2006, transcript.

On December 20, 2005, Attorney Wilmoth wrote to Horkulics' counsel, Fitzsimmons, and in this letter admitted:

> "Though no one ever asked me directly, **I BELIEVE THAT WE HAD A SETTLEMENT**. TIG took the position that it would object to the consent judgment portion of the settlement, which would have had no effect on the deal: either Judge Recht would have overruled TIG's objection, or he would have sustained its objection and not allowed you to use the consent judgment during the bad faith portion of the trial." [Emphasis supplied.] See Exhibits 16 and 17, May 30, 2006, transcript.

In this same letter Attorney Wilmoth further admits that Attorney Galloway "was completely on board with every provision of the settlement until TIG sent him its reservations of rights letter." See Exhibits 16, 17; May 30, 2006, transcript.

Clearly, Horkulics letter of September 1, 2005, and Wilmoth's confirmation of settlement letter of September 29, 2005, evidence that a settlement agreement was reached between Horkulics and Galloway. Exhibits 5 and 9; May 30, 2006, transcript. Significantly, Wilmoth's September 29, 2005, letter was copied to Galloway, his then personal counsel, Cuomo, and one of TIG's Chicago counsel, Zerman.

Attorney Wilmoth, who had both actual and apparent authority on behalf of both his client, Galloway, and Galloway's insurance company, TIG (tripartite relationship), unequivocally testified that there was a settlement agreement

entered into in May of 2005, which specifically included Galloway's confessed judgment on liability and damages of $1.5 million. T. 74:21. Attorney Wilmoth further testified that in the conference call of August 18, 2005, all three of the TIG representatives (who were also attorneys) were in agreement with the settlement, specifically including the feature of the confessed judgment of liability and damages to be entered by Galloway and to be objected to by TIG.

In TIG's petition for appeal they requested that they not be ordered to pay the $500,000 policy limits as part of the overall settlement ordered by the Circuit Court. Appellant's Petition, pp. 16, 17. This relief has been deleted in appellant's brief since being reminded by Horkulic's counsel in his reply brief to the petition that TIG had already paid the full $500,000 to the Horkulics on August 14, 2006. The $500,000 is, therefore, not an issue in this appeal.

At the conclusion of the May 30, 2006, hearing, it was Galloway's attorney who principally established TIG's acquiescence in the settlement. T. 97:9, 104:7. At the hearing, Galloway was represented by Attorney Joseph Selep and he elected not to call any witnesses. The following exchanges between the Court and counsel demonstrate that it was Galloway who insisted upon the relief against TIG, not Horkulics:

"The Court: ...Do I have the authority in approving this settlement of affecting the rights of TIG vis-a-vis Galloway?

Mr. Fitzsimmons: Judge, the way I envisioned this was a Horkulic/Galloway agreement.

The Court: I know that.

Mr. Fitzsimmons: And I think that that second phase that you identified, that there is this other party, because of this relationship with insurance companies, that that's a separate day, and a separate issue, in a separate motion between Galloway and his insurance company, first of all." T. 118.

. . .

"Mr. Selep:...I just wanted to make sure I understood insofar as Mr. Galloway's personal assets are not at risk; that's from either plaintiff or from TIG.

The Court: Completely.

Mr. Selep: Completely.

The Court: I don't know how else to say it." T. 126:5.

Attorney Wilmoth's file that was introduced into evidence as Exhibit 17 at the hearing on May 30, 2006, also evidences clearly that a settlement agreement was reached with the confessed judgment feature. In these exhibits, the handwritten notes of Attorney Wilmoth indicate a telephone conference with Galloway who "wants to push settlement as self-protection. Has spoken with Cuomo. Okay to tell Fitzsimmons he consents." Attorney Wilmoth's email of May 24, 2005, indicated that he had provisionally settled the Horkulics case against William

Galloway and that all depositions had been postponed. The email proceeds to indicate that "plaintiffs will file a motion for entry of consent judgment to which Mr. Galloway will agree (to protect his assets)." Attorney Wilmoth's file, Exhibit 17, also contains a letter from TIG's attorney Zerman to Attorney Wilmoth dated August 25, 2005, which acknowledges that the settlement was agreed to by Galloway:

> "With regard to the consent portion of the settlement, any such stipulation was agreed to by the insured, not only without TIG's consent, but in express contradiction to TIG's authority,..."

In a letter of September 29, 2005, from Wilmoth to his client Galloway and his then personal counsel, Jason Cuomo, Mr. Wilmoth recounts the chronology of events. Exhibit 17, March 30, 2006, transcript. Following the May 4, 2005, meeting and agreement wherein Rapponotti said okay to the items of the settlement, Wilmoth received an email from Attorney Zerman, representing TIG, on May 13, 2005, which he characterized as "the insurance company then began making noises about not providing coverage if we went through with the consent judgment..."

Attorney Wilmoth's chronology then describes a conversation he had with his client Galloway on May 20, 2005, where Galloway "wanted to push the settlement along as self-protection, he [Galloway] said he had spoken with Jason and that it was okay to

tell Robert Fitzsimmons that he consents to the settlement. I [Wilmoth] called Robert Fitzsimmons and relayed that." Wilmoth then proceeds to recount the May 24, 2005, email from him to Mark Rapponotti, an attorney/adjuster in house with TIG, "to tell him that plaintiffs were going to file a motion for entry of consent judgment and that Zerman and Attorney Casey would get notice of a hearing and would be able to come in and object." Wilmoth further notes in this chronology that he received a:

> "scathing letter from Ms. Zerman...about misapprehensions I [Wilmoth] had supposedly caused." The letter itself is full of misapprehensions but I need not get into that." I [Wilmoth] simply mention it because she [Zerman] tells me that I [Wilmoth] **HAVE A FIDUCIARY DUTY TO...TRANSAMERICA IN THAT I MUST TAKE...ALL STEPS NECESSARY TO PROTECT THE INTEREST OF GALLOWAY AND...TRANSAMERICA [TIG]**."

Wilmoth's letter of September 29, 2005, then proceeds to memorialize a telephone conversation between Tom Flaherty, Ed Ruberry, Attorney Zerman, and Wilmoth and later on Horkulics counsel, Fitzsimmons, was added. According to Wilmoth, this August 18, 2005, conversation resulted in what he "thought was a ...restatement of the settlement" and this included the confessed judgment on liability and damages with TIG having the right to lodge its objection.

Wilmoth's letter of September 29, 2005, Exhibit 17, May 30, 2006, transcript, reveals the true motive for TIG's actions in

trying to sabotage the settlement when he indicates that "...Transamerica [TIG] has threatened to attempt to collect from Mr. Galloway's own assets part of what Transamerica [TIG] may later be ordered to pay **FOR ITS OWN CONDUCT**." [Emphasis supplied.] Attorney Wilmoth also indicates in his December 20, 2005, letter, Exhibit 17, May 30, 2006, transcript, that William Galloway "...was completely on board with every provision of the settlement until TIG sent him its reservations of rights letter." He further acknowledges in that same letter "though no one ever asked me directly, I believe that we had a settlement."

At the March 29, 2006, hearing held in preparation for the final hearing on the Motion to Compel, the Court and all parties, including counsel for TIG discussed the procedure and roles of each of the attorneys and parties. See Exhibit D attached to the May 30, 2006, transcript. Keeping in mind that all claims against TIG and Cambridge had been stayed and this settlement arose solely and exclusively out of the legal malpractice claim against Defendant Galloway, the Court indicated that it was "hard to see how anybody other than the two parties to the settlement agreement should [participate]." Exhibit D, page 19. The Court did allow TIG's counsel to be present and specifically represent any agents of the insurance company who would be called as witnesses. Further, counsel for Horkulics indicated that he had "no problem with TIG's counsel

addressing the Court on areas of privileged materials in order to protect his client." See March 29, 2006, hearing transcript marked as Exhibit D, p. 20.

TIG's counsel, Flaherty and Zerman, were present throughout the May 30, 2006, hearing and did, in fact, participate as limited by the Court and lodged objections.

Prior to the May 30, 2006, hearing, Attorney Wilmoth's file (relating only to the settlement discussions) had been sent to TIG's counsel Zerman which was ultimately marked and introduced as Exhibit 17 at the hearing. During the hearing, the Court provided TIG's counsel with an additional opportunity to review the documents in order to voice any objections. T. p. 48, 49. TIG preserved its general objection to attorney-client privilege and hearsay at the hearing and Exhibit 17 was admitted.

III.

ARGUMENTS

A. THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS A SETTLEMENT AGREEMENT BETWEEN HORKULICS AND GALLOWAY

When one weeds out all of the extraneous rubric and procedural maneuvering, it becomes clear that Horkulics mission was to enforce the settlement agreement between them and Galloway. The evidence overwhelmingly demonstrates that such an agreement was reached between these two parties which

included eleven (11) items. See Order of August 25, 2006, finding of fact 30 (a-k). TIG has now paid the $500,000 cash portion of the settlement to Horkulics and none of the parties to this appeal have any meaningful objections as to any of the other items of the settlement. The sole and exclusive objection in this appeal exists between Galloway and his insurer TIG as to whether the Circuit Court properly ruled that Galloway's assets would not be at risk from TIG pursuant to an inquiry made by Galloway's attorney, Joe Selep, at the May 30, 2006 hearing. This ruling is memorialized in Conclusions of Law 13 through 15 and in the Circuit Court Order of August 25, 2006, page 30.

Horkulics' original motion to compel enforcement of the settlement agreement only requested the enforcement of the agreement between the Horkulics and Galloway. See Horkulics Motion to Compel. In addition, Horkulics' counsel only requested enforcement of the settlement agreement at the hearing of May 30, 2006, between the Horkulics and the defendant Galloway. T. 14. Furthermore, Horkulics counsel advised the Circuit Court at the end of the May 30, 2006, hearing that he had envisioned the issue created by the Motion to Compel as between Horkulics and Galloway, T. 118, 119, and further noted that there may be another phase to these

proceedings where the attorneys would actually have to take the witness stand. T. 121.

TIG has admitted that the settlement agreement between Horkulics and Galloway is proper and should be enforced; however, they object to extending the effect of the settlement agreement to themselves. Specifically, TIG both in its brief and petition for appeal admits that the Circuit Court could have entered an Order regarding Mr. Galloway and Horkulics agreement. TIG further admits "THERE COULD BE NO DISPUTE BY TIG IF THE ORDER ONLY STATED THAT MR. GALLOWAY AND [HORKULICS] ENTERED INTO A SETTLEMENT." See TIG's petition for appeal p. 16 and brief, p. 23.

At a minimum the evidence supports a finding that there is a settlement agreement between Horkulics and Galloway as set forth in the Circuit Court's August 25, 2006, Order.

B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT TIG HAD NO STANDING TO ACTIVELY PARTICIPATE IN A HEARING TO ENFORCE A SETTLEMENT AGREEMENT AGAINST ITS INSURED GALLOWAY.

TIG attempts to argue that it was deprived of a "property interest" without due process of law; however, they fail to identify the actual or existing property interest within the 11

items contained in the settlement agreement that constitute their property.

Any property interest TIG had in paying the ordered cash has become moot by their payment of the $500,000 after the Circuit Court's Order. This payment was made by TIG and they are not seeking in this appeal the return of such money. For all intents and purposes, TIG waived any right to claim that they have been deprived of property because of the Order to pay $500,000. Quite to the contrary, they have elected to make the payment without any type of reservation or condition. Obviously, TIG concedes that the $500,000 cash payment pursuant to their insurance policy on Galloway was properly made because they recognize that a settlement agreement was, in fact, effectuated between Galloway and Horkulics.

In analyzing the other ten (10) items of the settlement, it is clear that TIG has absolutely no property interest in any of such items. From the remaining ten (10) items, nine (9) are solely and exclusively elements relating to Galloway or Galloway's property interests and the only additional item would be Item (g) which permits TIG to file an objection to the confessed judgments. This provision grants to TIG rights and in no way could ever be construed as constituting the taking of

property. Therefore, TIG has no property rights in any element of the settlement agreement.

TIG complains that there was a large amount of property at issue, namely the 1.5 million [confessed] judgment. The confessed judgment is not a property right of TIG and represents a method to determine damages in the underlying legal malpractice case. If a jury was to determine damages in the underlying case, TIG would not have a right to participate. Likewise, if a Judge made such a finding in the underlying legal malpractice case, TIG would once again not be able to participate. Conceivably damages could be determined by other methods including requests for admission or summary judgment, at least to the extent that damages would be liquidated and provable.

It is significant to note that TIG has the right to file objections to the confessed judgment which is a safeguard to TIG and not a taking of a property interest. The effect of the confessed judgments and/or their use at later proceedings involving TIG (Unfair Claims Settlement Act Violation Claim) is an evidentiary matter for the trial court to decide from an admissibility standpoint and/or potentially as to the legal effect given in the jury instructions.

Shortly after the amended complaint was filed, TIG moved to bifurcate all proceedings. This motion was granted and the legal malpractice claim proceeded including TIG's dismissal of two separate law firms that had represented Galloway. TIG then employed William Wilmoth to represent the interests of Galloway. As in all cases involving an insured, the attorney also serves as the insurer's agent in communicating settlement information to the claimant. Such was clearly the case here when Attorney Wilmoth, initiated settlement negotiations intended to protect his client Galloway but by necessity also cloaked him with the authority to speak on behalf of his client's insurance carrier TIG. This relationship is customarily called a tripartite relationship which has been generally utilized to analyze discovery and privilege issues involving extra-contractual causes of action. See State ex rel. Allstate Ins. Co. v Gaughan, 203 W.Va. 358, 508 S.E.2d 75 (W.Va. 1998).

Horkulics called William Wilmoth to testify at the hearing in this matter and Galloway and his attorney were present throughout the entire proceeding. For whatever reason, Galloway elected not to call any witnesses. William Wilmoth was and is a partner in the law firm of Steptoe & Johnson and has practiced law for 31 years. He is a former United States Attorney for the Northern District of West Virginia, and has

handled hundreds, if not, thousands of damage claims principally on behalf of insureds. Mr. Wilmoth is one of the most respected attorneys in the State of West Virginia.

Clearly, at least for the purposes of the settlement negotiations, Attorney Wilmoth was an agent or at a minimum an apparent agent of Galloway and TIG. The evidence is overwhelming that a settlement occurred in May of 2005, and a restatement of that settlement agreement occurred on August 18, 2005, at which time four (4) TIG attorneys, one of which served in the capacity of an adjuster, were present and agreed to the settlement with Wilmoth and Horkulic's counsel.

Attorney Wilmoth's testimony, letters and file demonstrate that a settlement agreement with each of the eleven (11) features previously identified was consummated between Horkulics and Galloway. Attorney Wilmoth also unequivocally testified that TIG was in agreement with those eleven (11) items. See Exhibits 2, 5, 9, 16 and 17, attached to May 30, 2006, transcript and T. p. 31, 33, 35, 38, 40, 56, 57, 61, 74.

When an attorney appears in a Court proceeding, there is a strong presumption of his authority to represent such clients and the burden is upon the party denying the authority to clearly show the want of authority. See Syl. Pt. 1, Miranosky

v. Parson, 152 W.Va. 241, 161 S.E.2d 665 (W.Va. 1968); Syl. Pt. 5, Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E.2d 730 (W.Va. 2004).

In Sanson, a Motion to Compel a settlement had been filed and the Court, as in this case, held an evidentiary hearing. The Supreme Court indicated that they could not find that the Circuit Court "abused its discretion by enforcing the settlement agreement." The Court noted:

> "Where the law commits a determination to a trial Judge his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing Court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." Sanson, 215 W.Va. at 312, 599 S.E.2d at 735.

TIG has no property interest in the existing settlement agreement and any property interest they would have claimed, namely the $500,000, has been paid thereby making any such claim moot or waived. The evidence demonstrates that a settlement agreement occurred between the Horkulics and Galloway with TIG's consent. Appellant has not shown that the Circuit Court abused its discretion.

In addition, to the substantial evidence supporting the existence of a settlement agreement between Horkulics and Galloway which TIG authorized, it should be further noted that

compromise agreements are favored by the law and are to be construed as are any other contract. Floyd v. Watson, 163 W.Va. 65, 254 S.E.2d 687 (W.Va. 1979). Specific performance is available to enforce a compromise agreement assuming other requisites for this remedy are met. Id. at 690; 48 A.L.R. 2d 211.

Normally, Courts have considered it their duty to encourage, rather than to discourage, parties in resorting to compromise as a mode of adjusting conflicting claims. Sanders v. Roselawn Mem'l Gardens, Inc., 152 W.Va. 91, 159 S.E.2d 784 (W.Va. 1968).

> "Compromise by parties of their differences is favored by all Courts. When a matter has thus been put at rest, it should not be disturbed except for grave cause." Id., at 792.

In Allstates Investors, Inc. v. Bankers Bond Co., 343 F.2d 618 (6th Cir. 1965), the Court cited with approval the following language set forth in Melnick v. Binenstock, 318 Pa. 533, 179 A. 77, 78 (Pa. 1935):

> "A compromise or settlement of litigation is always referable to the action or proceeding in the Court where the compromise was effective; it is through that Court that the carrying out of the agreement should thereafter be controlled. Otherwise, the compromise, instead of being an aid to litigation would only be productive of litigation as a separate and additional impetus." Allstates, 343 F.2 at 624.

The Circuit Court properly exercised its discretion in allowing only the parties to actively participate in the May 30, 2006, hearing.

C. TIG HAS NO STANDING TO ARGUE THAT FINDINGS FROM THE SETTLEMENT HEARING "MAY" LATER AFFECT THEM IN ANOTHER PROCEEDING

TIG requests, at page 24 of its brief, an advisory opinion about the potential admissibility and/or use of certain findings surrounding the settlement hearing and Circuit Court's Order of August 25, 2006. TIG has no standing to request such ruling from this Court for a proceeding that is ongoing without defined issues. TIG's motion to stay the extra-contractual proceeding has prevented any meaningful discovery from having been conducted in the Unfair Claims Settlement Practices Act phase of this litigation. TIG now prematurely raises evidentiary issues and alleges that there are four (4) such findings relating to their acquiescence in the settlement agreement which "are central to TIG's defense in the bad faith portion of the underlying case." See appellant's brief, p. 24.

The settlement is what it is and TIG's actions are also what they are; however, it is difficult to understand how they now allege that these findings are central to their defense and their brief sheds no light on such assertions.

The main thrust of the Unfair Claims Settlement Practices Act claim prior to its filing was that TIG and/or Cambridge authorized their insured attorney to attempt to negotiate a malpractice claim with his client and then authorized their attorney to sue his client in a foreign jurisdiction in order to lessen the amount of his client's damages. The failure of TIG and/or Cambridge to attempt a fair, prompt and equitable settlement after liability was clear in the malpractice case was and is a significant claim; however, the existence of these claims should not prohibit the Circuit Court from making proper findings involving the ultimate resolution and settlement of the underlying claim.

Interestingly, appellant does not in any way explain how the four (4) findings are central to their defense. Whether TIG likes it or not, the four (4) items discussed in their brief at page 24 are findings that clearly existed in this proceeding, with the exception of fact 3 that "TIG failed to communicate to Mr. Wilmoth that it would not agree to the stipulated judgment." No such finding was made by the Circuit Court. To the contrary, the Circuit Court found that TIG did communicate and that they themselves would not consent to the confessed judgment but can file an objection.

It is submitted that the conduct of TIG throughout this litigation and their actions as post litigation conduct are factual issues to be determined by the trial court in the Unfair Claims Settlement Practices Act litigation.

D. THE MOTION FOR INJUNCTIVE RELIEF WAS FILED BY GALLOWAY AND IS AN ISSUE NOT INVOLVING APPELLEE HORKULICS.

Attorney Galloway's attorneys filed a motion for injunctive relief which would affect the rights and duties between Galloway and his insurer TIG. Horkulics are not involved in that motion.

Nonetheless, it appears that the Circuit Court did make findings and rulings, at the request of Galloway's attorney at the conclusion of the hearing, which prevent TIG from seeking personal assets against Galloway because of his actions in the settlement agreement. The Court found ample evidence that TIG agreed with the settlement and only after the agreement did TIG raise these issues.

TIG employed multiple attorneys to represent Galloway in these proceedings and it was one of these attorneys, Mr. Wilmoth who initiated and consummated the settlement between Horkulics and Galloway while maintaining regular correspondence

and communication with the insurer, who had a contractual obligation to indemnify Galloway up to the limits of coverage.

Although the records are clear, including documentation that TIG fully consented to the settlement on separate occasions, any misunderstanding as to TIG's rights against its insured Galloway are unique to those two parties and/or their attorneys. If TIG is dissatisfied with the results obtained by their attorneys, they can file such actions as they deem proper and advisable to address such misunderstandings.

E. THE CIRCUIT COURT DID NOT ERR IN ORDERING THE WAIVER OF ATTORNEY-CLIENT PRIVILEGE TO THE EXTENT THE ORDER WAIVES TIG'S PRIVILEGE.

(1) Galloway did not waive the attorney-client privilege belonging to TIG.

Appellant alleges that the Circuit Court in its August 25, 2006, Order at page 28 permitted defendant Galloway to waive the attorney-client privileges belonging to TIG. No such Order was entered. Appellant's cite page 28 of the Order which reads in pertinent part that "...defendant Galloway waives all attorney-client privilege HE HAS to any and all documents, records and things, maintained by TIG and/or Cambridge and his or their attorneys."

Obviously TIG has misinterpreted the Court's Order which only indicates that Galloway waives his attorney-client privilege and the Order goes on to explain that this privilege is waived as to any and all documents, records and things that have been maintained by TIG, Cambridge or their attorneys. The Order does not waive privileges belonging to TIG.

To the extent the privileges are quasi attorney-client privileges, the trial court will have to address the discoverability and use of those materials pursuant to this Court's dictates in State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 508 S.E.2d 75 (W.Va 1998).

(2) The Circuit Court did not err in allowing Attorney Wilmoth to waive TIG's attorney-client privileges on matters exclusively relating to the settlement at issue.

As evidenced by the hearing transcript of May 30, 2006, pages 44-49, Attorney Wilmoth brought to the hearing his file relating to the negotiations of the settlement. These documents were provided to TIG's counsel on the Friday before the Monday hearing and the Circuit Court further provided an opportunity to TIG's counsel to review these materials during the hearing and before comment or introduction. The documents are marked as Exhibit 17, attached to the May 30, 2006, transcript. As the Court can see, all of these documents relate to the specific issue of the settlement which was

created in large part by TIG. Clearly, TIG cannot object to the existence of a settlement and then attempt to hide behind an asserted privilege in order to secrete relevant evidence. TIG created the issue relating to the settlement agreement and to the extent that the materials contained within Attorney Wilmoth's file represent TIG attorney-client privilege materials they are discoverable and admissible in this proceeding.

Furthermore, Attorney Wilmoth reviewed the materials as did an in-house committee at Steptoe & Johnson to insure that TIG privileged materials were not disclosed. T. 47. This Court has the opportunity to review the documents submitted by Attorney Wilmoth which are relevant to the negotiations and discussions surrounding the issue as to whether a settlement agreement existed and to what extent it would apply against TIG. Nothing earth-shattering outside of settlement negotiations and discussions are contained within these documents which are vital to the overall determination as to whether the agreement should be compelled.

Interestingly, the appellant TIG does not identify any document in its brief which, in any way, would prejudice TIG or which should be singled out as irrelevant or prejudicial to TIG.

F. THE CIRCUIT COURT PROPERLY ADMITTED STATEMENTS CONSTITUTING VERBAL ACTS AND/OR STATEMENTS BY AN AGENT.

Appellant alleges that Attorney Wilmoth testified that Mr. Rapponotti, an attorney and adjuster from TIG, specifically agreed to the terms of the settlement. See Appellant's Brief, p. 32, T. p. 30-31. These statements of Mr. Rapponotti indicated his agreement to the terms of the settlement.

Appellant alleges that this is hearsay testimony and, therefore, inadmissible pursuant to Rule 802 of the West Virginia Rules of Evidence. Appellant's brief pp. 31-33. TIG's objection was preserved at the hearing. T. 49.

There is a separate category of non-hearsay which is designated as either a "verbal act" or "verbal conduct" in which the utterance of the words is, in itself, an operative fact which gives rise to legal consequences. See 29 Am.Jur.2d Evidence §665.

Similarly, an out-of-court statement, such as Rapponotti's statement, may be offered to show that an agreement or contract was formed by the making of that statement because the making of the statement in and of itself gives rise to legal consequences and the mere fact of the utterance is relevant to the issue as to whether or not there was an express agreement.

Ziegler v. Florida, 402 So. 2d 365 (Fla. 1981), Cert. denied, 455 US 1035 (1982). The advisory committee's note to subdivision (c) of the Federal Rules of Evidence, Rule 801, indicates that "the effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights." Fed. R. Evid. 801.

Proof of an oral utterance by the party in a contract suit constituting the offer and acceptance which brought the contract into being are not evidence of assertions offered testimonially, but rather verbal conduct to which the law attaches duties and liabilities. These are defined as verbal acts and are, therefore, not hearsay. See Strong, John W., McCormick on Evidence §249 (5th Ed. 1999).

In Moen v. Thomas, 267 NW 2d 146, (N.D. 2001), the Supreme Court of North Dakota held that:

> "Statements about the terms of, or assent to, an oral contract fall within the category of non-hearsay designated as 'verbal acts' or 'verbal conduct'; The utterance of the words is, in itself, an operative fact which gives rise to legal consequences. Id. at Syl. Pt. 4

The Court further explained that "because it is the outword manifestations of assent which govern, not the parties secret

intentions, it is the mere fact of utterance which is relevant in determining whether there was an oral agreement." Id.

In addition to being admissible as a "verbal act," Rapponotti's statements are admissible because Attorney Wilmoth was an agent of TIG at least to the extent of settlement negotiations. In Bulgamott v. Perry, 154 S.W.3d 382, 291 (Mo. 2005), the Court recognized that an attorney hired by an insurer to defend an insured has the authority to settle cases on behalf of the insured. This is a clearly established principle of insurance law.

Rapponotti's statements as testified to by Wilmoth also evidence that Rapponotti and TIG gave Attorney Wilmoth authority to make certain offers on behalf of Galloway which affected TIG. Statements made by a principal tending to show the authority of an agent are not considered hearsay. See Fournoy v. Hewgley, 234 F.2d 213 (10th Cir. 1956).

The statements of attorney/adjuster Rapponotti as testified to by Attorney Wilmoth were admissible and evidenced TIG's consent to the settlement agreement. These statements constituted verbal acts and were not hearsay. In addition, Attorney Wilmoth for purposes of the settlement was an agent on

behalf of TIG and his client Galloway. As such, the statements by Rapponotti are clearly admissible.

IV.

CONCLUSION

For all of the reasons set forth herein, the Circuit Court's Order of August 25, 2006, should be affirmed in its entirety. At a minimum all of the provisions of the settlement should be approved between Horkulics and Galloway. Appellees Horkulics request such further and general relief as this Court deems just and proper.

Respectfully submitted,

JEFFREY A. HORKULIC, REBECCA A. HORKULIC, his wife, and JEFFREY HORKULIC, As Natural Parent and Legal Guardian of Stephanie Horkulic and Benjamin Horkulic, minors

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CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF ON BEHALF OF APPELLEES** was made upon the parties to this action by mailing a true copy thereof by United States mail, postage prepaid, to its attorneys on the 13th day of August, 2007, as follows:

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